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COURT OF APPEALS  
DIVISION II

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No. 43737-6-II

STATE OF WASHINGTON

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

STATE OF WASHINGTON,

Respondent,

VS.

THOMAS DEAN ESPEY,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT FOR  
PIERCE COUNTY IN THE STATE OF WASHINGTON

The Honorable Linda CJ Lee

**PRO-SE SUPPLEMENTAL BRIEF**

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TABLE OF CONTENTS

	Page:
A. ASSIGNMENTS OF ERROR.....	1
B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....	1
C. STATEMENT OF THE CASE.....	1
1. Incorporation of the Appellate Record.....	1
2. The Second Trial: Counts I and II.....	1
a. Espey's Post-Arrest Statement.....	1
b. Testimony of Campbell and Bischof.....	2
c. Resnick's Testimony.....	4
d. Remedy of reversal and dismissal.....	10
D. ARGUMENT	
THE APPELLANT'S CONVICTION WAS A DIRECT	
RESULT OF INSUFFICIENT EVIDENCE OF	
BURGLARY, IN VIOLATION OF THE FOURTEENTH	
AMENDMENT TO THE UNITED STATES	
CONSTITUTION.....	6

APPELLATE COUNSEL'S ARGUMENTS:

1. Appellant's Conviction Was A Direct Result of a Search Warrant That Was Not Supported by Probable Cause, In Violation of Article I, § 7, of the Washington State Constitution, and the Fourth Amendment to the United States Constitution	
2. Appellant's Conviction Was A Result of A Violation of a Right to a Public Trial, Guaranteed by the Fourteenth Amendment to the United States Constitution	
3. The Appellant's Conviction Was A Result of Prosecutorial Misconduct, In Violation of the Fourteenth Amendment to the United States Constitution	
E. CONCLUSION.....	11
PRO-SE SUPPLEMENTAL BRIEF - i	

TABLE OF AUTHORITIES

Washington State Supreme Court

<u>Cases:</u>	<u>Page:</u>
STATE V. ATEN, 130 Wn.2d 640, 927 P.2d 210 (1996).....	8
STATE V. BRUNSON, 128 Wn.2d 98, 905 P.2d 346 (1995)...	7
STATE V. DELMARTER, 94 Wn.2d 634, 618 P.2d 99 (1980)..	6
STATE V. HARDESTY, 129 Wn.2d 303, 915 P.2d 1080 (1996).....	10

Washington State Court of Appeals

STATE V. AMEZOLA, 49 Wn.App. 78, 741 P.2d 1024 (1987).....	9
STATE V. LUBERS, 81 Wn.App. 614, 915 P.2d 1157, <u>rev. denied</u> , 130 Wn.2d 1008, 928 P.2d 413 (1996).....	8
STATE V. ROBERTS, 80 Wn.App. 342, 908 P.2d 892 (1996).....	9
STATE V. LUNA, 71 Wn.App. 755, 862 P.2d 620 (1996).....	passim
STATE V. SPRUELL, 57 Wn.App. 383, 788 P.2d 21 (1990).....	10

United States Supreme Court

In re WINSHIP, 397 U.S. 358, 364 (1970).....	passim
NORTH CAROLINA V. PEARCE, 395 U.S. 711, 717 (1989)..	10

STATUTORY PROVISIONS AND CONSTITUTIONAL AMENDMENTS:

RCW 9A.52.020	
RCW 9A.52.040	
SIXTH AND FOURTEENTH AMENDMENTS, U.S. CONSTITUTION	
PRO-SE SUPPLEMENTAL BRIEF - ii	

A. ASSIGNMENTS OF ERROR

The evidence introduced at trial was insufficient to support the appellant's conviction for burglary.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Where there was insufficient evidence to prove beyond a reasonable doubt, that the appellant or as an accomplice, intended on committing theft of property when he entered the building, require the burglary conviction to be dismissed with prejudice?

C. STATEMENT OF THE CASE

1. Incorporation of the Appellate Record

As with the appellant's opening brief, he asks this Court to incorporate by reference, and include the records and files therein. RAP 16.9

2. The Second Trial: Counts I and II

a. Espey's Post-Arrest Statement

Police located Espey on May 25 and arrested him. 6RP 41, 44. A detective interrogated him that same day. 6RP 47.

The appellant told the detective that on the day in question, he went over to Sonny Campbell's trailer to talk with him about the rape of his friend, Ms. Bass. Mario Falsetta and another man named Casey followed him over. Two other men named Bill and Gary were standing outside the residence when Espey arrived. When Espey knocked on the door, Campbell said "come in" without realizing who it was. When Espey went into the living room,

Campbell stated "hey, what's up?" Espey replied that he came to talk to Campbell about something. Campbell immediately countered "I didn't do it," without even asking why Espey had come over. Espey became angry and had began arguing about the rape. As Espey grabbed Campbell by the shirt collar, he was forced to let him go by a man named Casey, who apparently had slipped underneath both men, grabbed Campbell and shoved him into the bathroom.

Espey immediately backed up from the scene, as he observed the men take turns in beating Campbell with their fists. Espey only went over to Campbell's residence to talk with him. [APPELLANT'S EXHIBIT - C]

Campbell offered to not testify against Espey if he "donated" his tow truck to Campbell. Id. at 20. Espey later heard that the men who said they would follow him over to Campbell's residence, had taken drugs and other things from Campbell's place; Espey was not there at the time the men had stolen any of the items. Espey was also not with the other men and had subsequently arrived in his own truck. Id. at 13-15.

b. Testimony Of Campbell and Bischof

Campbell testified that he was at home with his girlfriend, Kimberly Bischof<sup>2</sup> and Donny Resnick. 6RP-20, 22, 57. The door was open. 6RP 28. From Campbell's viewpoint, he observed Espey, Mario Falsetta, and two -

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<sup>2</sup>Bischof had convictions for crimes of dishonesty. 6RP74  
PRO-SE SUPPLEMENTAL BRIEF - 2

unknown men entered the residence. 6RP 22-24. Campbell came down the hallway of the home. 6RP 22-23, 39-40, 59, 61, 63. Campbell and his girlfriend knew Espey through Katie Bass. 6RP 21, 60. While in the living room, Campbell testified that he asked Espey what he was doing there. 6RP 23, 61. Espey accused Campbell of drugging and raping Bass. 6RP 22-23, 24-25, 62. At this time, Bischof locked herself in the bedroom. 6RP 26, 62.

During the events described herein, Campbell testified that Espey grabbed him by the collar, [supposedly after he had put on some gloves]. 6RP 23, 30. Three men beat Campbell while he was cornered in the bathroom. 6RP 24-25, 62. Campbell also claimed that Espey had punched him.<sup>3</sup> 6RP 25, 27.

Mario Falsetta kicked the bedroom door in and told Bischof to sit on her hands. 6RP 62-64. The fighting in the bathroom was ongoing -- the men taking turns beating Campbell with their fists, as Espey left the scene. 6RP-64, 70. The men that were not with Espey left after someone arrived at the residence. 6RP 64-65. Bischof waited for ten-minutes before calling 9-1-1. 6RP 63. Campbell testified that blood was coming from his ear after the beating. 6RP 28. A responding officer photographed injuries to Campbell's ear and neck. 6RP 9, 12-13.

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<sup>3</sup>Campbell failed to tell police this testimony. 6RP30-31.  
PRO-SE SUPPLEMENTAL BRIEF - 3

When police arrived, Bischof told police that several items of property was missing, to wit: cell phone, jewelry, paint ball gun, and a laptop computer -- were taken from the bedroom. 6RP 26-27, 34, 64-67, 72.

Campbell told police that someone had taken a bank-bag that was full of money and methamphetamine. 6RP 32. Bischof then interjected, by claiming that Mario Falsetta had taken the bag of money and the cell phone, and that one of the men she did not know had taken the paint ball gun. 6RP 66-67. Bischof claimed that Espey had walked in the bedroom at one point, but did not know what Espey had did after that. 6RP 64.

As a "Meth" addict, Campbell had consumed the drug the previous day, which affected his perception and memory. 6RP 27, 32. He offered to drop the charges against Espey, or "change" his testimony, to say, inter alia, "it doesn't look like him," if Espey gave one of his vehicle's to Campbell as "charity," but denied seeking the vehicle himself. 6RP 34-35. When Espey heard about what had happened when he left Campbell's residence, he phoned Bischof, and said he was sorry. 6RP 35-36.

c. Resnick's Testimony

Donny Resnick testified for the defense, who was present, and lived with Campbell at the time of the events described herein. 6RP 76-77. He knew of Espey only as an acquaintance. 6RP 76.

Resnick testified that Espey, Mario, and an unknown person came to the door and hollered for Campbell. 6RP 77. Resnick also accurately testified that Campbell came up front and waived them in. Id. In this regard, Campbell welcomed Espey into his home. 6RP 82.

Consistent with Espey's post-arrest statement, Resnick testified that Espey talked with Campbell as to whether Campbell drugged their friend, Ms. Katie Bass. 6RP 77-78.

According to Resnick, the damage to Campbell's face must have happened when the men left -- he heard nor saw any altercation between Campbell and the men. 6RP 80, 82, 91-95. Resnick also did not see any of the men carry any items from the residence when they left -- they casually walked in and out of the home. 6RP 79-83.

Approximately ten minutes after the men were gone, Bischof came out of the bedroom and told Resnick to call the police because Campbell had been robbed. 6RP 79-85. At that point, Resnick testified that he was forced to leave the establishment because of his outstanding arrest-warrant. RP 79, 84.

Similar to Bischof, Resnick had prior convictions for crimes of dishonesty. 6RP 81. Finally, Resnick knew of Campbell's issues with other individuals over sizeable debts and Campbell's gambling problem. 6RP 82.



D. ARGUMENT

THE APPELLANT'S CONVICTION WAS A DIRECT RESULT OF INSUFFICIENT EVIDENCE, IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

a. Due Process requires that the prosecution prove every essential element of the crime beyond a reasonable doubt. Evidence is sufficient to support a conviction if, viewed in the light most favorable to the jury's verdict, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); In re Winship, 397 U.S. 358, 364 (1970). A claim of the sufficiency of evidence admits the truth of the evidence and all reasonable inferences that a trier of fact can draw from that evidence. Salinas, 119 Wn.2d at 201. Circumstantial and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The Winship reasonable doubt standard protects (1) the defendant's interest in being free from unjustified loss of liberty, (2) stigmatization resulting from a conviction, and (3) it engenders community confidence in the criminal law by giving "concrete substance" to the presumption of innocence. 397 U.S. at 363-64.

b. The prosecution failed to prove the intent element of the crime charged beyond a reasonable-  
PRO-SE SUPPLEMENTAL BRIEF - 6

doubt. The State may not rely on an inference of the intent element of a crime. State v. Brunson, 128 Wn.2d 98, 105-107, 905 P.2d 346 (1995).

First, in challenging the intent element of the crime of Burglary in the First Degree,<sup>2</sup> to convict him of this offense, the jury had to find that he entered or remained unlawfully in a building, that the entering or remaining was with "intent" to commit a crime against a person or property, and that these acts occurred in Washington. [JURY INSTRUCTION NO. 8], (emphasis added).

Espey argues that the record is void of intent to enter Campbell's home unlawfully with the intent to assault him or steal any of his property.

RCW 9A.52.040 provides:

Inference of Intent. In any prosecution for burglary, any person who enters or remains unlawfully in a building may be inferred to have acted with intent to commit a crime against a person or property therein, unless such entering or remaining shall be explained by evidence satisfactory to the trier of fact to have been made without such criminal intent.

RCW 9A.52.040. This statute creates a permissive rather than a mandatory inference of intent, and in a jury trial, the trial court may instruct the jury according to this statute. Brunson, 128 Wn.2d at 105-06. However, the State may not rely on this inference alone to prove the intent element of burglary beyond a reasonable doubt. Id.-

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<sup>2</sup>RCW 9A.52.020

Espey points to Resnick's testimony and argue that because he did not enter Campbell's home unlawfully, proof of intent is lacking to the offense of burglary.

While the statutory inference aids the prosecution, without additional evidence of intent, the inference does not supply proof beyond a reasonable doubt. Furthermore, Campbell testified that he could essentially change his testimony at a drop of a hat for "charity."

c. The prosecution failed to prove that Espey acted under accomplice liability. The evidence is sufficient to support his conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Aten, 130 Wn.2d 640, 667, 927 P.2d 210 (1996). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." State v. Lubers, 81 Wn. App. 614, 618-19, 915 P.2d 1157, rev. denied, 130 Wn.2d 1008, 928 P.2d 413 (1996) (quoting, State v. Salinas, 119 Wn.2d supra at 201)). An appellate court defers to the trier of fact in resolving conflicting testimony, and weighing the persuasiveness of the evidence. Lubers, 81 Wn. App. at 619.

Here, the State charged Espey with committing Burglary in the First Degree, under the accomplice liability.

He admits that he went to Campbell's home to discuss the-

allegations of Campbell's rape of their friend, Ms. Bass; he may have committed simple assault by grabbing Campbell by the collar; he was present when the men had begun to beat Campbell with their fists, and that they may have taken items of value from Campbell's home -- but, mere presence at the scene of a crime, even coupled with assent to it, is not sufficient to prove complicity. State v. Luna, 71 Wn. App. 755, 759, 862 P.2d 620 (1993).

In its essentials, in establishing accomplice liability, the prosecution must demonstrate more than mere physical presence at the scene, and assent to the crime committed. State v. Roberts, 80 Wn. App. 342, 355, 908 P.2d 892 (1996).

"One does not aid and abet unless, in some way, he associates himself in the undertaking, participates in it as in something he desires to bring about, and seeks by his action to make it succeed"

Roberts, Id. at 355-56, (quoting, State v. Amezola, 49 Wn. App. 78, 89, 741 P.2d 1024 (1987) (citations omitted)).

In the instant case, in viewing the evidence in the light most favorable to the prosecution, the evidence does not support sufficient evidence of accomplice liability.

Espey arrived first, and separated from the other party. Espey observed two men standing outside of Campbell's home upon arrival, and there was no evidence that the other men were with Espey. In this regard, a rational jury could conclude that Espey had no intention of physically assaulting Campbell, and any of the alleged stealing of-

PRO-SE SUPPLEMENTAL BRIEF - 9

the alleged victims' personal belongings.<sup>2</sup> Espey arrived alone and left alone in his truck. Mere physical presence at the scene is insufficient to support the burglary conviction. Roberts, 80 Wn. App. at 355.

In its essentials, there was no evidence of a common scheme or plan in the instant case. Without being an accomplice and without proving the intent element, the appellant's conviction for burglary cannot stand. Espey simply stood there even though the other men were committing a crime. The only crime Espey committed was a simple assault when he grabbed Campbell by the collar. 6RP 40.

d. Reversal and dismissal is the appropriate remedy. In the absence of evidence from which a rational trier of fact could find beyond a reasonable doubt Mr. Espey committed the offense for which he was convicted, the judgment cannot stand. State v. Spruell, 57 Wn. App. 383, 389, 788 P.2d 21 (1990). The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, prohibits a second prosecution for the same offense, after reversal for lack of sufficient evidence. State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996), (citing, North Carolina v. Pearce, 395 U.S. 711, 717 (1989)).

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<sup>2</sup>When Espey was captured, the search of the Cadillac failed to uncover any items that were allegedly stolen from the Campbell's residence.

D. CONCLUSION

For the reasons set forth in Mr. Espey's pro-se supplemental brief, he respectfully request that this Court reverse the burglary conviction in Count II, and dismiss with prejudice pursuant to the Winship standard.

DATED this 9th. day of April, 2013.

RESPECTFULLY SUBMITTED,

By: Thomas Dean Espey  
/S/THOMAS DEAN ESPEY  
Appellant pro-se

Presented By:

A Private Attorney General

DECLARATION OF SERVICE BY MAIL  
(28 U.S.C. §1746)

I, THOMAS DEAN ESPEY, declare under penalty of perjury,  
under the laws of the State of Washington, that on the  
9th. day of April, 2013, I mailed the following  
legal documents by First Class U.S. Mail through prison  
authorities, under Court of Appeals, No. 43737-6-II :  
PRO-SE SUPPLEMENTAL BRIEF, (containing 11 pages),  
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CLERK OF THE COURT:

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STATE OF WASHINGTON - DIV. II,  
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TACOMA, WA., 98402-4454

OFFICE OF THE PROSECUTING  
ATTORNEY:  
930 TACOMA AVE. SOUTH,  
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TACOMA, WA., 98402-2171

I certify under penalty of perjury, that the foregoing  
is true, correct and complete.

DATED this 9th. day of April, 2013.

Thomas Dean Espey  
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